

NO. 48592-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JAMES KELLEY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael Hayden, Judge

MOTION TO WITHDRAW AND BRIEF
REFERRING TO MATTERS IN THE RECORD
WHICH MIGHT ARGUABLY SUPPORT REVIEW

CATHERINE GLINSKI
CHRISTOPHER H. GIBSON
Attorneys for Appellant

NIELSEN, BROMAN & ASSOCIATES
810 - 3rd Ave., Suite 320
Seattle, WA 98104
(206) 623-2373

TABLE OF CONTENTS

	Page
I. <u>IDENTITY OF MOVING PARTY</u>	1
II. <u>STATEMENT OF RELIEF REQUESTED</u>	1
III. <u>FACTS RELEVANT TO MOTION</u>	1
IV. <u>GROUND S FOR RELIEF</u>	2
V. <u>BRIEF REFERRING TO MATTERS IN THE RECORD THAT MIGHT ARGUABLY SUPPORT REVIEW</u>	2
A. <u>Potential Issues on Appeal</u>	2
B. <u>Statement of the Case</u>	3
C. <u>Potential Arguments on Appeal</u>	7
1. THE TRIAL COURT IMPROPERLY DENIED KELLEY'S MOTION FOR A CONTINUANCE TO INVESTIGATE ALTERNATIVE TREATMENT RESOURCES.....	7
2. THE EVIDENCE DID NOT ESTABLISH THAT KELLEY FAILED TO MAKE REASONABLE PROGRESS IN TREATMENT.....	8
3. THE COURT SHOULD HAVE MODIFIED THE TERM OF INCARCERATION.	10
VI. <u>CONCLUSION</u>	11

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Coggle v. Snow,
56 Wn. App. 499, 784 P.2d 554 (1990) 8

State v. Badger,
64 Wn. App. 904, 827 P.2d 318 (1992) 9

State v. Hurd,
127 Wn.2d 592, 902 P.2d 651 (1995) 8

State v. Pollard,
66 Wn. App. 779, 825 P.2d 336,
834 P.2d 51, review denied,
120 Wn.2d 1015 (1992) 2

State v. Shove,
113 Wn.2d 83, 776 P.2d 132 (1989) 10

State v. Theobald,
78 Wn.2d 184, 470 P.2d 188 (1970) 2

FEDERAL CASES

Anders v. California,
386 U.S. 738, 18 L. Ed. 2d 493,
87 S. Ct. 1396 (1967) 2

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHERS</u>	
RAP 15.2(h)	1, 2
RCW 9.94A.120(8)(a)(ii)	10
RCW 9.94A.120(8)(a)(iv)	9
RCW 9.94A.120(8)(a)(vi)	10
RCW 9.94A.345.....	9

I. IDENTITY OF MOVING PARTY

Nielsen, Broman & Associates, appointed counsel for appellant, James Kelley, requests the relief designated in part II of this motion.

II. STATEMENT OF RELIEF REQUESTED

Appointed counsel requests permission to withdraw pursuant to RAP 15.2(h).

III. FACTS RELEVANT TO MOTION

By order dated June 25, 2001, and pursuant to an order of indigency entered in superior court on May 18, 2001, this Court appointed Nielsen, Broman & Associates to represent appellant Kelley in his appeal from revocation of his SSOSA and reinstatement of his standard range sentences on two counts of first degree child molestation.

In reviewing this case for issues to raise on appeal, undersigned counsel did the following:

- (a) read and reviewed the verbatim report of proceedings from the guilty plea, sentencing, and revocation hearings;
- (b) read and reviewed all of the clerk's papers;
- (c) researched all pertinent legal issues and conferred with other attorneys in the office concerning potential legal and factual bases for appellate review.

IV. ****GROUND**s FOR RELIEF**

RAP 15.2(h) allows an attorney to withdraw on appeal where counsel can find no basis for a good faith argument on review. In accordance with the due process requirements of Anders v. California, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967); State v. Theobald, 78 Wn.2d 184, 185, 470 P.2d 188 (1970); and State v. Pollard, 66 Wn. App. 779, 825 P.2d 336, 834 P.2d 51, review denied, 120 Wn.2d 1015 (1992), counsel seeks to withdraw as appellate counsel and allow Kelley to proceed pro se. Counsel submits the following brief to satisfy their obligations under Anders, Theobald, Pollard, and RAP 15.2(h).

V. **BRIEF REFERRING TO MATTERS IN THE RECORD THAT MIGHT ARGUABLY SUPPORT REVIEW**

A. **Potential Issues on Appeal**

1. Did the court improperly deny defense counsel's motion for a continuance to investigate alternative treatment resources?
2. Was the evidence sufficient to support the court's finding that appellant failed to make reasonable progress in his sexual deviancy treatment program?
3. Did the court incorrectly conclude it lacked authority to modify the term of incarceration when it revoked appellant's suspended sentence?

B. Statement of the Case

On May 13, 1999, James Kelley pled guilty to two counts of first degree child molestation, committed June 7, 1996. 1RP¹ 8, 12; CP 9-26. Finding a special sex offender sentencing alternative was appropriate, the court imposed and then suspended standard range concurrent sentences of 89 months. It ordered Kelley to serve 180 days in jail and to enter, make reasonable progress in, and successfully complete sexual deviancy treatment. CP 29.

Kelley entered treatment upon his release from jail in November 1999. 3RP 7. When he was terminated from treatment in February 2001, the state sought revocation of Kelley's SSOSA. 3RP 3; CP 46.

At the start of the revocation hearing, the court appointed counsel to represent Kelley. 3RP 2. The attorney noted that she had represented Kelley in the past but had received very little information pertinent to the revocation hearing since she had not been appointed until the hearing commenced. 3RP 3. Because the Department of Corrections had recommended that the SSOSA continue if Kelley found an alternative treatment provider, counsel requested a continuance to investigate that option. 3RP 4; Supp. CP ____ (Sub. No. 81, Notice of Violation, filed 5/11/01, at 3). The state objected, and the court denied the motion for continuance. 3RP 4.

Tim Smith, Kelley's treatment provider, then testified regarding Kelley's

¹ The verbatim report of proceedings consists of four volumes, referenced as follows: **1RP** - 5/13/99; **2RP** - 7/16/99; **3RP** - 4/2/01; **4RP** - 5/11/01.

treatment. According to Smith, Kelley had made overall progress since he began treatment in 1999. He was able to achieve some stability at work, he was able to identify patterns associated with his offenses and the origins of his deviancy, and he learned how to do relapse prevention. 3RP 12. While there had been frustration with regard to Kelley's scheduling individual appointments and disclosing the nature of his offense to others in his life, those problems were resolved to some extent. 3RP 12-13,

Smith testified that Kelley had at times done very good work for his level of education and maturity, even though at other times he resorted to old patterns and made impulsive decisions. 3RP 13. The previous summer Kelley had unapproved contact with two minor children, his girlfriend's daughter and brother who were visiting from Alaska. 3RP 21. He disclosed the contact to Smith, however, and worked with the court and in treatment to resolve the issue. Smith saw no need to terminate Kelley's treatment as a result of that incident. 3RP 15.

Smith terminated Kelley from treatment when Kelley admitted, after failing a polygraph test, that he had been lying about his use of alcohol for some months. 3RP 14. As a condition of his treatment, Smith was told he was not permitted to use alcohol. He was also consistently informed that truthfulness was expected during treatment. 3RP 24. Because Kelley had lied during group treatment as well as at court hearings, Smith concluded he could no longer treat Kelley. 3RP 14-15. Smith did not believe Kelley was amenable to treatment in the community but believed he could ultimately be successful

with inpatient treatment. 3RP 16.

On cross examination Smith admitted that Kelley had disclosed his history of alcohol abuse when he began treatment. Although Kelley was told not to use alcohol, he was not required to seek treatment for alcohol dependency or attend Alcoholics Anonymous meetings. 3RP 21. Smith acknowledged that denial is a core symptom of alcoholism. 3RP 22.

After Smith's testimony, the revocation hearing was continued so that defense counsel could review the record and prepare argument. 3RP 26. When the hearing resumed, counsel objected to revocation without presenting further evidence. 4RP 3.

Kelley then addressed the court. He first apologized for his actions, and then explained that he had been in denial about his alcohol problem until he failed the polygraph test. Since then he has attended AA meetings and has found them helpful. Kelley asked the court to give him another chance. 4RP 4.

The court noted that at the last review hearing that it told Kelley that unless he fully complied with treatment requirements he would be incarcerated. 4RP 6. Despite this ultimatum, Kelley was terminated from treatment due to his lack of candor regarding his alcohol use. The court thus concluded revocation of the SSOSA was appropriate. 4RP 7.

In response to the court's ruling, defense counsel asked the court to reconsider the term of confinement imposed. She noted that the standard range for Kelley's offense was 67 to 89 months. Although Kelley did not

succeed in treatment, he had made substantial efforts and he was very remorseful. Under the circumstances, a sentence at the low end of the standard range was more appropriate than the 89 months originally imposed. 4RP 7-8. The state argued that the court had no legal authority to modify the sentence, and the court agreed. 4RP 8.

The court entered orders revoking Kelley's SSOSA and remanding him to the Department of Corrections to serve concurrent 89-month sentences. CP 36-39. Because Kelley's offenses were committed on June 7, 1996, the court imposed three years of community custody. CP 48-49. Kelley filed this timely appeal. CP 40-43.

C. Potential Arguments on Appeal

1. THE TRIAL COURT IMPROPERLY DENIED KELLEY'S MOTION FOR A CONTINUANCE TO INVESTIGATE ALTERNATIVE TREATMENT RESOURCES.

Following Kelley's termination from treatment, a DOC corrections officer filed a report regarding Kelley's community supervision. The report notes that Kelley had adjusted well to supervision, had made regular legal financial obligation payments, and had failed only one polygraph. Supp. CP ____ (Sub. No. 81, at 1). He was also working full time and receiving excellent progress reports from his employer. Id. at 2. Based on this investigation, DOC did not recommend revocation of Kelley's SSOSA. Instead, the recommendation was that alternative treatment resources be explored so that Kelley could continue in supervision. Id.

When counsel was appointed at the revocation hearing she was aware of the DOC recommendation, but had not yet had an opportunity to locate an alternative treatment provider for Kelley. The court denied counsel's motion for continuance to pursue that investigation. 3RP 3-4. The court continued the proceeding following testimony from Kelley's treatment provider, so that counsel could review various reports in the record and prepare argument. 3RP 26. When the hearing resumed over a month later, counsel presented no evidence regarding alternative treatment resources for Kelley. 4RP 3.

A ruling on a motion for continuance is within the court's discretion and is reviewable on appeal only for a manifest abuse of discretion. Coggle v. Snow, 56 Wn. App. 499, 504, 784 P.2d 554 (1990). A court abuses its discretion if it is exercised on untenable grounds or for untenable reasons, considering the purpose of that discretion. Id. at 507; see also State v. Hurd, 127 Wn.2d 592, 594, 902 P.2d 651 (1995) (abuse of discretion to deny continuance so that appellant could prepare reply brief, where appellant did not receive state's response brief before hearing).

Since counsel was not appointed to represent Kelley until the revocation hearing commenced, she had had no opportunity to investigate alternative treatment resources. Kelley may wish to argue that the court below abused its discretion in denying the motion for continuance.

2. THE EVIDENCE DID NOT ESTABLISH THAT
KELLEY FAILED TO MAKE REASONABLE
PROGRESS IN TREATMENT.

Smith testified that Kelley had made overall progress in treatment, and

he described Kelley's successes. 3RP 12-14. Nonetheless, he did not believe Kelley had made reasonable progress, because Kelley had not been candid about his alcohol use. 3RP 15. Smith also testified, however, that he had known from the time Kelley began treatment that Kelley had an alcohol problem, that denial is a core symptom of alcoholism, and that Kelley had never been required to seek treatment for his alcohol addiction. 3RP 21-22. Kelley admitted at the hearing that he had been in denial about his alcoholism until he failed the polygraph examination, but said he had been attending and benefiting from AA meetings since then. 4RP 4.

Revocation of a suspended sentence lies within the discretion of the court. It is not necessary for the state to prove a violation beyond a reasonable doubt. State v. Badger, 64 Wn. App. 904, 908, 827 P.2d 318 (1992). Rather, so long as the court is reasonably satisfied the defendant breached the conditions of his SSOSA or failed to make satisfactory progress in treatment, the court may order revocation. Id.; RCW 9.94A.120(8)(a)(iv)² (The court may revoke the suspended sentence and order execution of the sentence if the defendant violates the conditions of the suspended sentence, or the court finds that the defendant is failing to make satisfactory progress in treatment.).

Kelley may wish to argue that the evidence does not support the court's finding that he violated the conditions of his SSOSA by failing to make

² The statute was revised effective July 1, 2001. The version in effect at the time Kelley was sentenced is referred to in this brief. See RCW 9.94A.345 ("sentences imposes . . . shall be determined in accordance with the law in effect when the current offense was committed").

reasonable progress in treatment.

3. THE COURT SHOULD HAVE MODIFIED THE
TERM OF INCARCERATION.

Once the court revoked Kelley's SSOSA, defense counsel requested that it reduce the term of incarceration and impose a more appropriate sentence within the standard range. The court found it had no authority to modify an existing sentence and ordered Kelley to serve the 89 months previously imposed. 4RP 7-8.

Under the SRA, a determinate sentence must be set at the sentencing hearing and is generally not subject to later change. State v. Shove, 113 Wn.2d 83, 86, 776 P.2d 132 (1989). The statute permits modification of sentences only in specifically delineated circumstances. Id. The statutory provisions regarding the SSOSA program require a sentencing court to impose a sentence within the sentencing range at the time the SSOSA is established. RCW 9.94A.120(8)(a)(ii). If the court finds the defendant violated the conditions of his suspended sentence or failed to make satisfactory progress in treatment, the court may revoke the SSOSA and order execution of the sentence. RCW 9.94A.120(8)(a)(vi).

No statutory provision specifically authorizes the court to alter the term of incarceration imposed at sentencing. Kelley may wish to argue, however, that the discretion given the court regarding SSOSAs includes the discretion to modify the term of incarceration when revoking the suspended sentence.

VI. CONCLUSION

For the reasons stated above, counsel for appellant asks that the motion

to withdraw as appointed counsel be granted, and that appellant be allowed to proceed pro se should he choose to do so.

DATED this ____ day of October, 2001.

Respectfully submitted,

NIELSEN, BROMAN & ASSOCIATES

CATHERINE GLINSKI

WSBA No. 20260

CHRISTOPHER H. GIBSON

WSBA No. 25097

Office ID No. 91051

Attorneys for Appellant